Supreme Court, U.S.
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No. 03-1343

IN THE

Supreme Court of the United States

KEITH JOHNSON,

Petitioner,

v.

ORANGE COUNTY, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Keith Johnson failed to properly preserve his constitutional claims because he either agreed to relinquish those claims or he failed to make a timely objection?

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STATEMENT OF THE CASE

A. The Tax Collector Properly Denied Keith Johnson's Two Applications for Two *New* Adult Entertainment Licenses.

On or about September 29, 1997, Keith Johnson submitted two applications for two *new* adult entertainment licenses in his own name for the properties located at 2201-B and 2207 South Orange Blossom Trail ("SOBT"), Orlando, Florida. R1265, *Joint Pretrial Statement*, p. 2. The Orange County Tax Collector, by and through the Occupational License Department, timely denied both applications for the reasons specified in the denial letters, to-wit:

> The existing business already has a license for an adult dancing establishment, which is nonconforming. Section 38-50 states that nonconforming uses of land shall not be extended. Sec. 3-76(b) of the Orange County Code prohibits the enlargement of any adult entertainment facility that does not comply with zoning district and distance separation requirements under Chapter 3 of the Orange County Code. This application was turned down by the Orange County Building Department because they were unsuccessful in reaching you for an inspection.

R1265, *Joint Pretrial Statement*, p. 2.

B. Keith Johnson Had Previously Relinquished the Two *Existing* Adult Entertainment Licenses at Issue as Part of a Plea Agreement with the State of Florida.

At trial, the court considered a plea agreement between Keith Johnson and the State of Florida in a prior case styled, *State of Florida v. Keith Johnson*, Case No. M097-20890/K. The plea agreement was made by oral colloquy before Judge Arnold presiding over the Criminal Justice Division of the Ninth Judicial Circuit in and for Orange County, Florida, on November 25, 1998, and the plea agreement was subsequently transcribed. R38-53 & 54-61.

The trial court carefully reviewed the plea agreement, given that each party waived the right to put on other testimony or evidence regarding the plea agreement (R625, R1653-54, R1630), and found that, "in return for the dropping of criminal charges, Keith Johnson previously agreed to give up the two adult entertainment licenses for 2201-B and 2207 SOBT and forever waived his claim and his right to apply or re-apply for adult entertainment licenses for 2201-B and 2207 SOBT." *Petition for Writ of Certiorari ("Petition")*, p. 5a.

C. At Trial, Keith Johnson Consented to the Limited Scope of Review On Appeal.

The transcript of the trial shows that Keith Johnson consented to the limited scope of review on appeal. The transcript provides:

> THE COURT: . . . . I think the parties have agreed if, in fact, I determine that he is bound by the plea agreement, not to apply for any new licenses or not to get any new licenses, and now he's only going to have two instead of four, then that eliminates all of this -- this issue.
>
> MR. MASON: The only reason the case is being dismissed is because of what I call the Arnold transcript [the plea agreement before Judge Arnold]. *No other issues are going up on appeal.* That's the issue.
>
> THE COURT: I'm not ruling on any of these things concerning constitutionality, who said what to whom, who did what, who bargained in good faith or not. The plea agreement is what I'm considering binding him or prohibiting him from applying for new licenses.
>
> MR. MASON: Not mandamus, not res judicata?

THE COURT: No, no, no, no.

MR. MASON: *Fair enough.*

R1677, *Trial Transcript*, p. 171, lines 7-25 (emphasis added). Instead of requesting the right to put on additional evidence or asking the trial court to consider the constitutional issues, Keith Johnson expressly consented to the trial court's limited scope of review when he said, "fair enough."

Further, at the post-trial hearing on the entry of the *Final Judgment* (R1504), Keith Johnson did not seek any redress as to the constitutional claims.

REASONS FOR DENYING THE WRIT

1. Keith Johnson Failed to Preserve the Constitutional Claims.

Keith Johnson has no right to seek review before the United States Supreme Court on an issue that was not properly preserved at trial. It is well settled that this Court will not pass upon an argument not addressed by courts below. *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999). This is even true when a party's brief in the court of appeals alludes to the theory it seeks to raise in this Court. *Id.* at 470, n.6. An argument that was not raised below is waived. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n.4 (2002).

Orange County addressed Keith Johnson's failure to preserve the constitutional claims in its Answer Brief submitted to the Fifth District Court of Appeal. Orange County argued, in part, that the constitutional challenges were not preserved because Johnson agreed to the narrow scope of appellate review, or alternatively, because Johnson failed to make a contemporaneous objection.

As a general rule, reviewing courts will not consider points raised for the first time on appeal. *Saka v. Saka*, 831 So. 2d 709 (Fla. 3d DCA 2002). In order to preserve an issue for appellate review, the appellant must present a record indicating that an adequate and timely objection was interposed in the proceedings below challenging the action sought to be reviewed on appeal. *Id.* at 711. In *State v. Osvath*, 661 So. 2d 1252, 1254 (Fla. 1995), the Florida Supreme Court explained that:

> an appellate court must "confine the parties litigant to the points raised and determined in the court below, and [must] not [] permit the presentation of points, or objections for the first time in [the appellate] court, when the same might have been cured or obviated by amendment, if attention had been called to them in the trial court."

Id. at 1254 (quoting *Hartford Fire Ins. Co. v. Hollis*, 50 So. 985 (Fla. 1909)).

Because Johnson failed to make a contemporaneous objection, Johnson failed to properly preserve the constitutional issues for appeal. Regardless of Johnson's motivation for failing to properly preserve the constitutional issues at trial, whether strategic, budgetary, or for some other reason, Johnson cannot retroactively attempt to expand the issues on appeal after obtaining an adverse ruling.

2. There is No Compelling Reason to Review this Case.

As a result of Johnson's express relinquishment of the two adult entertainment licenses at issue in order to gain a benefit in a separate criminal case, and Johnson's failure to properly preserve the constitutional issues for appeal, this case is not appropriate for review on a writ of certiorari because, in accordance with Supreme Court Rule 10, there are no compelling reasons to accept this case for review. This is not a case where either the *Final Judgment* entered by the trial court or the "per curiam affirmed" entered by the Fifth District Court of Appeal resulted in a written decision on an important federal question, let alone a decision on an important federal question that conflicts with the decision of another state court of last resort, a United States court of appeals, or a decision of this Court.

3. A Complete Copy of the Final Judgment at Issue was Not Included in the Appendix.

The Petition for Writ of Certiorari is not in strict compliance with Supreme Court Rule 14(i)(i) because a complete copy of the *Final Judgment* at issue was not included in the Appendix. Although Appendix B to the *Petition for Writ of Certiorari* contained the text of the *Final Judgment*, the attachment to the *Final Judgment*, which was the plea agreement, was omitted. *Petition*, p. 3a.

CONCLUSION

Keith Johnson's Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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